JD(SF)–95–03
Los Angeles, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PROVIDENCE HEALTH SYSTEM—
SOUTHERN CALIFORNIA d/b/a
PROVIDENCE HOLY CROSS MEDICAL CENTER
Employer

and **31-RC-8295**

HEALTHCARE EMPLOYEES UNION, LOCAL 399,
SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO
Petitioner

Douglas R. Hart, Atty, Sheppard Mullin,
Los Angeles, California for the Employer.
Wayne Cassard, Service Area Director Human Resources,
Burbank, California for the Employer.
Monica T. Guizar, Atty, Weinberg, Roger & Rosenfeld,
Los Angeles, California for Petitioner.

ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

LANA H. PARKE, Administrative Law Judge. Pursuant to a Stipulated Election Agreement entered into by the Providence Health System—Southern California d/b/a Providence Holy Cross Medical Center (the Employer) and Healthcare Employees Union, Local 399, Service Employees International Union, AFL-CIO (Petitioner), an election by secret ballot was conducted under the direction of the Regional Director of Region 31 (the Region) of the National Relations Board (the Board) on September 25 and 26, 2003,[1] among the employees of the Employer in the following agreed-to unit:

> All full-time and regular part-time, including per diem, service and maintenance employees employed by the Employer at its main hospital facility located at 15031 Rinaldi Street, Mission Hills, California,[2] excluding all office clerical employees, registry employees, travelers, subcontracted employees, managerial employees, all other employees, guards and supervisors as defined in the Act.

The Region served a tally of ballots upon the parties following the election that included the following information:

Approximate number of eligible voters……315

[1] All dates are 2003 unless otherwise indicated.

[2] Individual classifications are set forth as Attachment A to the Stipulated Election Agreement and to the Report on Objections, Order Directing Hearing, and Notice of Hearing.

Ballots cast for the Petitioner……...113
Ballots cast against the Petitioner……200
Void ballots…….. 1
Challenged ballots…… 11[3]

On October 6, Petitioner filed timely objections to conduct affecting the results of the election. I conducted a hearing in Los Angeles, California, November 12 through 14. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Employer and the Petitioner, I make the following

Findings of Fact and Discussion

Petitioner filed Objection Nos. 1 through 12 and thereafter withdrew Objection No. 12. The remaining eleven objections are set forth below. Those involving common or similar issues are grouped together.

Objection Nos. 1 and 3

> The Employer by its agents, made promises of benefits to those eligible voters who would vote against the Union, and/or made promises of benefits to all eligible employees as an inducement not to vote for the Union, and/or made promises of benefits if the Union lost the election.
>
> The Employer, through its agents, interfered with the laboratory conditions necessary for the conduct of the election by unilaterally granting benefits to employees shortly before the election.

During the course of its campaign against Petitioner, the Employer held meetings with groups of employees including environmental services (EVS) employees, which were attended, variously, by Kerry Carmody (Mr. Carmody), Chief Administrator, Irma del Rio (Ms. Del Rio), John Ramirez, and Joaquin Ramirez, housekeeping supervisors, Elsa Gonzalez (Ms. Gonzalez) charge nurse, and Sister Colleen Settles (Sister Settles), a nun of the Dominican order employed by Providence Health System as Regional Director for mission leadership.

EVS employee Manual Bravo (Mr. Bravo) testified that in one of the employer campaign meetings, John Ramirez, Ms. Gonzalez, Ms. Del Rio, and two or three coworkers said not to vote for the Union because whatever St. Joseph's, an area hospital currently in negotiations with Petitioner, agreed to for their employees, the Employer would match or better. John Ramirez testified that employees asked about the St. Joseph's negotiations during one or two of the meetings and that he told them he did not know what St. Joseph's employees were getting. He denied telling employees they would get the same or better than St. Joseph's employees or hearing any other supervisor say that. I found John Ramirez to be a sincere and forthright witness. I found Mr. Bravo's testimony to be vague and sometimes confused, and I could not determine whether he had separated what supervisors said from what coworkers said. Therefore, I credit John Ramirez's testimony, and I find no evidence any supervisor told employees the Employer would match or better St. Joseph's benefits.

In another meeting held about a week before the election attended by Ms. Del Rio, John and Joaquin Ramirez, and about 22 housekeeping employees, John Ramirez said the Employer

[3] The challenged ballots are insufficient to affect the results of the election.

planned to reduce the size of assigned work areas and thereby reduce the workload. Thereafter, in the week before the election, the Employer reduced the number of rooms to be cleaned per housekeeping employees on the day shift. John Ramirez credibly testified he did an evaluation of EVS equipment and workloads in about June when an area facility, Granada Hills Hospital, closed down, and the Employer experienced patient increase. Pursuant to the evaluation, he decided the Employer needed additional EVS employees. He told employees in June and July meetings that additional EVS help would decrease the employee/hospital room ratio. Shortly thereafter the Employer hired two additional workers, which reduced the workload as anticipated. The two new hires left about the beginning or middle of September and the workload increased. As he had in June and July, John Ramirez told employees he was trying to hire to bring the workload down. The Employer hired two replacement employees within the following two weeks. In these circumstances, the Employer merely continued a hiring process begun prior to the union campaign and informed employees of it. By doing so, the Employer neither made promises of reduced workload benefits to employees nor granted benefits by employing additional EVS staff. Accordingly, I find no evidence to support Objection Nos. 1 and 3, and I recommend they be overruled.

Objection No. 2

> The Employer by its agents, threatened to close the facility and/or take other retaliatory measures if the Union won the election.

Employee Victoria Barragon testified that in one of the employer campaign meetings two recently hired housekeeping employees previously employed by Granada Hills hospital told employees their former employer had closed because of the Union and that possibly the Employer would do likewise. There is no evidence any agent or supervisor of the Employer made or endorsed any similar statement.

Employees testified that at a meeting shortly before the election, John Ramirez told them it might be the last day employees could speak to him if the Union won the election. Mr. Bravo testified that John Ramirez said in a few more days, he would not be able to tell employees anything. John Ramirez testified he never told employees he could not communicate or deal with them if the Union won the election. He did tell employees in a meeting held three to five days prior to the election that it was the last meeting in which he could discuss employer benefits, referring apparently to the Board's prohibition against captive audience speeches during the 24-hour period immediately preceding the election. See *Peerless Plywood Co.,* 107 NLRB 427 (1953). I accept John Ramirez's testimony, which is consistent with Mr. Bravo's. I find nothing in John Ramirez's statements in this regard that interfered with the holding of a fair election. Accordingly, I find no evidence to support Objection No. 2, and I recommend it be overruled.

Objection No. 4

> The Employer, by its agents, interfered with the free choice of employees and intimidated those employees by interviewing and interrogating eligible employees about their support of the Union shortly before the election.

Petitioner presented no evidence in support of Objection No. 4. Accordingly, I recommend Objection No. 4 be overruled.

Objection No. 5

The Employer, through its agents and security guards, interfered with free choice and laboratory conditions by improperly videotaping and surveilling Union organizers and workers at locations where the Union was distributing literature to those workers.

During the weeks prior to the election, organizers handed out literature near the entrance to Respondent's loading dock where most SVE employees entered and exited work. Respondent's security staff regularly parked a security car just inside the Employer's property near the organizers with a security guard stationed inside or outside the car in a position to observe the organizers' activities. Acting supervising security guard, Rodderic Frazier, occasionally stood outside the Employer's facility on the loading dock where he observed union organizers talking to employees. The security guards monitored the area because on numerous occasions they had found union representatives entering the property and trespassing on the loading dock and in the parking lot and because some employees had said they wanted to fight the union representatives. Although security never had to disrupt any fights and all participants behaved themselves in the presence of security, the sole avowed purpose of placing a patrol car and security guard at the loading dock entrance was to protect property, employees, and organizers.

"Numerous unfair labor practice cases hold…that an employer's mere observation of open, public union activity on or near its property does not constitute unlawful surveillance…Thus…union representatives and employees who choose to engage openly in their union activities at an employer's premises should have no cause to complain that management observes them." *Hoschton Garment Co*., 279 NLRB 565, 567 and fn. 5 (1986). Here, the Employer's security guards watched open employee union activity but did not take down employee names, videotape any activity, suggest in any way that the Employer remarked its employees' union activities,[4] or intensify security patrols as the election neared.[5] In these circumstances, I cannot conclude hospital security's observation of open, public union activity interfered with employee free choice or election laboratory conditions. Accordingly, I recommend Objection No. 5 be overruled.

Objection No. 6

The Employer, by its agents, interfered with the laboratory conditions and the free choice of employees by allowing and encouraging anti-union employees to engage in anti-union campaigning during working hours and permitting those same employees to make telephone calls encouraging people to vote against the Union during working hours while on work time.

The only evidence Petitioner presented that might support this objection related to the conduct of Ms. Gonzales whom John Ramirez permitted to attend an employer meeting with EVS employees. At the end of the meeting, John Ramirez told employees they could ask her any questions they had about employee benefits. After John Ramirez had left the room, Ms. Gonzales encouraged employees to wear stylized blue ribbons she had produced, which signified the wearer supported the Employer in the union campaign. She told employees to see her if anyone wanted a ribbon.

[4] See *Fred'k Wallace & Son, Inc,.* 331 NLRB 914, 916 (2000).

[5] See Villa Maria Nursing And Rehabilitation Center, Inc., 335 NLRB 1345,1355 (2001).

A supervisor's solicitation of employees to wear anti-union paraphernalia may violate Section 8(a)(1) of the Act if a supervisor puts an employee in a position where he or she has to declare a position on unionization. *Barton Nelson, Inc.,* 318 NLRB 712 (1995); *Gonzalez Packing Co.,* 304 NLRB 805 (1991). It is not clear Ms. Gonzalez put any employee in such a position rather than merely making the ribbons available to interested employees. See *Catalina Yachts,* 250 NLRB 283 (1980). I do not have to resolve that question, however, because I do not find the Petitioner has shown Ms. Gonzalez was a supervisor or employer agent at any relevant time.

The Petitioner carries the burden of proving supervisory status. *Kentucky River Community Care, Inc.,* 121 S. Ct. 1861, 1866-1867 (2001); *Dean & Deluca New York, Inc.,* 338 NLRB No. 159, at slip op. 2 (2003) ("The party asserting [supervisory] status must establish it by a preponderance of the evidence [citations omitted]"). Section 2(11) of the Act defines a supervisor as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical nature, but requires the use of independent judgment.

The evidence shows Ms. Gonzalez assigns work to employees, oversees bed control and admitting, and handles transfer patients from ICU to the nursing floor. No evidence was presented showing whether her exercise of these functions was "merely routine or clerical" or "require[d] the use of independent judgment," an element essential to the finding of supervisory status. See *Illinois Veterans Home at Anna L.P.,* 323 NLRB 890, 891 (1997). While Ms. Gonzalez's title "charge nurse" might denote supervisory authority, it is responsibility not title that makes an individual a supervisor. See *Laar Co., LLC,* 340 NLRB No. 114, fn. 10 (2003 Consequently, I find the Petitioner has not met its burden of proving Ms. Gonzalez was a supervisor.

As to whether Ms. Gonzalez acted as the Employer's agent when she invited employees to accept a blue ribbon depends on whether she spoke with apparent authority. Apparent authority exists if the Employer created a reasonable basis for employees to believe it authorized Ms. Gonzalez to speak and act for the Employer. *D&F Industries, Inc.*, 339 NLRB No. 73 at slip op. 2 (2003). "Whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." Section 2(13) of the Act. I cannot find that John Ramirez's merely permitting Ms. Gonzalez to attend the employee meeting endowed her with apparent authority to advocate the wearing of blue ribbons. She took no part in the meeting itself and spoke to employees only after the meeting ended and John Ramirez left. There is no evidence Ms. Gonzalez was "held out as a conduit for transmitting information [from the employer] to the other employees." *Cooper Industries,* 328 NLRB 145 (1999). Accordingly, I find Petitioner has not met its burden of showing that Ms. Gonzalez was the Employer's agent. Inasmuch as the evidence does not establish Ms. Gonzalez was either a supervisor or an agent of the Employer at any relevant time, her statements do not form a basis for overturning the election.

Accordingly, I recommend Objection No. 6 be overruled.

Objection No. 7

The Employer gave improper financial incentives to employees who would come in to vote against the Union.

The Employer paid mileage reimbursement for unit employees who came in to vote though not scheduled for work. John Ramirez told employees it was their decision as to how they voted.

It is not objectionable for an Employer to pay for employee transportation expenses in a Board election. Only monetary payments exceeding "reimbursement for actual transportation expenses amount to a benefit that reasonably tends to influence the election outcome." *Sunrise Rehabilitation,* 320 NLRB 312 (1995). It follows that payments for mileage costs incurred by off-duty voters are "limited to unavoidable costs clearly related to casting a ballot"[6] and are similarly unobjectionable.[7] Accordingly, I recommend Objection No. 7 be overruled.

Objection No. 8:

The Employer, by its agents including security guards, interfered with the free choice [of] employees and destroyed laboratory conditions by utilizing security guards to hand out anti-union literature during shift changes and to wear anti-union "blue ribbon" insignia.

Some security guards handed out antiunion fliers; some wore the stylized blue ribbons described above. The evidence does not establish the Employer directed its guards to do so, but even assuming the Employer did, such is not objectionable. An employer may make antiunion paraphernalia and propoganda available to employees, but may not solicit employees so as to require them "to make an observable choice that demonstrates their support for or rejection of the union." *Barton Nelson, Inc.,* supra at 712. There is no evidence the Employer engaged in such prohibited conduct. Petitioner has cited no cases to support its proposition that supervisors or security guards noncoercively handing out antiunion literature or wearing antiunion paraphernalia is either unlawful or interferes with employees' free election choices. Indeed, case law is to the contrary. See *K-Mart Corporation,* 336 NLRB 455 (2001); *Hale Nani Rehabilitation and Nursing Center,* 326 NLRB 335 (2001). Accordingly, I recommend Objection No. 8 be overruled.

Objection No. 9

During the critical period, the Employer unilaterally modified its enforcement of access rules and prohibited Union representatives from distributing literature in the cafeteria and threatened such representatives with arrest while in the cafeteria.

According to Wayne Cassard, the Employer's San Fernando Valley area director of Human Resources, the Employer's policy permitted union representatives access to the Employer's cafeteria but prohibited their distributing literature on hospital premises. The

[6] *Allen's Electric Company, Inc.,* 340 NLRB No. 119, slip op. 2 (2003).

[7] *B&D Plastics,* 302 NLRB 245 (1991) cited by the Petitioner is inapposite. That case involved an employer's grant of a paid day off in connection with its antiunion campaign.

Petitioner does not attack the policy, of which its representatives were aware, but contends it was not consistently applied during the critical period. Union representatives Arturo Castellanos (Mr. Castellanos) and Arnulfo De La Cruz (Mr. De La Cruz) testified as follows: on some campaign visits to the cafeteria, various security guards directed the two union representatives to leave even when they were not distributing literature, saying they were not permitted in the cafeteria; on one occasion, the guards told Mr. Castellanos they would arrest him because he was in the cafeteria; on several occasions, the Employer's security guards threatened to arrest Mr. De La Cruz because he was in the cafeteria; Mr. De La Cruz admittedly attempted to pass out literature in the cafeteria. Security guards, Barry Lee Boyd, Mr. Frazier, Mercos Cesar Pena, and Marcu Manuel testified they only asked union representatives to leave the cafeteria when they saw the representatives passing out literature.

In resolving credibility among the two union representatives and the security guards, I note the admissions of both union representatives that they brought campaign literature with them to the cafeteria, and that, although aware of the Employer's prohibition, Mr. De La Cruz distributed literature there. From that I infer the guards had legitimate occasion to ask the union representatives to leave the cafeteria for violating hospital policy. I found the union representatives' accounts of discrepant treatment vague. Therefore, I accept the testimony of the security guards and conclude they consistently restricted cafeteria access to Petitioner's representatives only when the guards had reason to believe the representatives were distributing literature there. Accordingly, I recommend Objection No. 9 be overruled.

Objection No. 10

> The Employer, through its agents, interfered with the free choice of its employees by telling those employees they were not permitted to talk to Union representatives and other Union supporters in non-patient care areas and during non-work time. The Employer harassed and threatened employees for engaging in such conversation.

About a week before the election employee Mr. Bravo and about eight other unit employees met with representatives of the Petitioner in the cafeteria during lunch break. Joaquin Ramirez, holding a piece of paper, approached the table where the group sat. Joaquin Ramirez said someone had reported to him that almost all his people were talking to the union. He said he would take down their names, and he appeared to write on the paper. He said he could see those who worked for him were on their lunch breaks.[8] Later, he told the employees that on lunch break they could do what they wanted, and he could do nothing.

Supervisor Cindy Damboise (Ms. Damboise) saw Mr. De La Cruz speaking with an employee in the fourth floor patient area while the employee was working. She told Mr. De La Cruz he was not allowed in the area. She held the employee's shoulder and told him he could not speak to the organizer in the patient care area.[9] No evidence was presented as to which, if any, other employees may have witnessed the interaction.

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[8] Joaquin Ramirez denied writing down any names. He "probably" had a notebook and pen in his hand. I conclude that the employees could reasonably have believed he wrote down their names.

[9] The accounts of Mr. De La Cruz and Ms. Damboise differ essentially in degree. It is likely that Ms. Damboise's actions and language were less violent and aggressive than Mr. De La Cruz recounted but more than Ms. Damboise was willing to admit to. I do not find it necessary to resolve the two accounts.

Joaquin Ramirez's conduct in appearing to write down the names of employees who were meeting with union representatives unlawfully created the impression of surveillance. *T & W Fashions, Inc.,* 291 NLRB 137 (1988). Unlawful conduct is "a fortiori, conduct which interferes with the results of an election." *Airstream, Inc.,* 304 NLRB 151, 152 (1991).[10] Ms. Damboise may have been unwarrantedly forceful in telling an employee and a union organizer they could not have a discussion in a patient care area, and she might arguably have intimidated the employee. It does not follow, however, that the election must be set aside because of Joaquin Ramirez and/or Ms. Damboise's conduct. Petitioner lost the election by 87 votes. There is no evidence that Joaquin Ramirez or Ms. Damboise's conduct was disseminated to other employees or that it affected any employees other than the employees immediately concerned. Even assuming the votes of all employees Joaquin Ramirez and Ms. Damboise spoke to were compromised, their combined number is insufficient to affect the results of the election.[11] See *M.B. Consultants, Ltd.,* 328 NLRB 1089, 1090 (1999).

Accordingly, I recommend Objection No. 10 be overruled.

Objection No. 11

> The Employer, through its agents, interfered with the laboratory conditions and the free choice of its employees by improperly invoking religious issues during the campaign and making appeals to religion as part of the anti-union campaign.

Mr. Bravo testified that Sister Settles told employees in one of the meetings that the Catholic Church was against the union and that all employees should vote. Many of the unit employees are of the Catholic faith. Sister Settles testified that she spoke in English to employees and said she was there to affirm where the Church stood regarding unionization, that it was the employees right to join or not join, and that all should take seriously their responsibility in deciding how to vote. She said her hope was that the Employer's management team had been able to respect employees' rights and would be able to work with employees in meeting their needs. She denied saying the Church was against the Union. I credit Sister Settles's account. Both she and John Ramirez, who corroborated her denial, credibly testified she spoke in English without translation. Mr. Bravo is clearly more comfortable with the Spanish language than with English. Mr. Bravo could not recall anything else Sister Settles allegedly said except that all employees should vote. Because of Mr. Bravo's limited English skills and limited recall, I cannot find he heard Sister Settles say the Church was against the Union rather than merely inferring it from her unobjectionable comments. Inferences drawn without proper basis cannot support findings of fact. Accordingly, I find no evidence to support Objection No. 11, and I recommend it be overruled.

[10] I do not find that Joaquin Ramirez's later assertion that employees could do as they pleased on their breaks vitiated the unlawfulness of the conduct. There was no assurance that he had not written down names, and there is no evidence he gave the assurance to all affected employees.

[11] At most, the two incidents involved eleven employees.

CONCLUSION

Based on the above, I recommend that Petitioner's objections, in their entirety, be overruled and that this matter be remanded to the Regional Director for appropriate action.[12]

Dated, San Francisco, California, December 23, 2003.

Lana H. Parke
Administrative Law Judge

[12] Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, within 14 days from the date of issuance of this Recommended Decision, either party may file with the Board in Washington D.C. an original and eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.